BRIEF OF ARGUMENT IN SUPPORT OF PETITION

We have, in the petition, supra, stated the nature and history; cited (p. 6) the volume and page of the opinion; (pp. 7 to 8) stated the basis of this Court's jurisdiction; and, under the reasons for the writ (pp. 11 to 17) taken the liberty to cite the pertinent decisions. Begging, therefore, for brevity, to pretermit repetition, we merely add references to the record, and the Specifications of Error.

STATEMENT OF THE CASE

We adopt what is said in "Matter Involved", supra. The proof raised fact issue:

1. AGAINST QUACKERY, CORRUPTION, FRAUD AND CRIME IN PETITIONER'S PRACTICE: He was 53 years old (R. 479); had studied medicine, his father's profession, since boyhood (R. 480); secured his license in Tennessee in 1915 (R. 484), practiced ever since; took up practice in Kansas in 1917 (R. 484); continued research including periods of special study in clinics in Chicago, New York, and elsewhere, and later in Europe and China (R. 484); early became interested in glandular study (R. 485, 487); was for years Fellow of the American Medical Association (R. 486, 487), and "became convinced there was benefit in glandular transplantation", and made much experimentation, but discontinued that practice in 1933 before coming to Del Rio (R. 489-490), his central thought being to evolve an operation to avoid the removal of prostatic glands in men (R. 490-492); has performed at least three thousand of the present prostate gland operations (R. 494) and a very

high percent (R. 496)—80 to 95% (R. 33-59) effect cures. The beneficial nature of this operation, the scientific examinations, treatments and care of patients, the complete equipment and careful technique used were testified to for petitioner by Doctors Petermeyer (R. 31, 426), Davis (R. 536), Conn (R. 545, 581) and Chandler (R. 553) and petitioner (R. 98, 184, 479). Fact case of the efficacy of his operation, the regularity of his practice in all things save only that he advertised, and refutation of the charge of fraud, corruption and violation of the mail fraud statute was thus made for petitioner. Petitioner testified his Connecticut license was revoked in 1923, while he was in China, a "blanket revocation" of all Eclectic doctors; and the indictment in California after he had been out there in consultation with a doctor, returned and dismissed in his absence (R. 499-500); further that he has not treated persons by mail or radio (R. 501); his operation benefits mankind, and adopted by other doctors (R. 535).

2. MONETARY DAMAGE BY THE PUBLICATION is shown in the admitted fact that the magazine had very large circulation throughout the country, including the Doctor's home town; to have caused him much shame and humiliation (R. 535) and that his income fell off about $200,000.00 in the year following the publication (R. 129).

3. MALICE: The intemperate article itself (R. 601-607) is replete with circumstance of reckless and malicious mood; petitioner had therefore, in 1930, sued respondent for libel, writing in many respects similar (Exh. 51, R. 1014), suit dismissed in 1934 (R. 1086). Respondent, on shipboard from Europe, a month before this article was written, had twice declined, and again after arrival

at the hotel declined, opportunity to speak to petitioner or the latter's wife (R. 267-8) and stopped his daughter from playing with petitioner's son (R. 267-8); first publishing, in January, 1938, Hygeia, an article stating that petitioner, at Milford, Kansas, was a blatant quack "whose professional record reeks with charlatanism of the crudest type", and the following month published the article in question.

4. ERRONEOUS EXCLUSION OF EVIDENCE FROM PATIENTS: After respondent's three expert urinologists from Dallas, Houston and San Antonio, Texas (R. 292, 322, 342) had testified to their opinion the operation of petitioner was of no effect, and after the symptoms of enlarged prostate gland trouble had been shown, and after said experts had admitted that any method for relief of that common trouble to spare necessity of operation, even the milder transurethral, would be a boon to humanity, and that the way to learn the benefit of an operation is to note the results, petitoner, in rebuttal, offered sixteen witnesses, severally shown to have undergone his operation, through period of five years, all offering to testify that before their operations they suffered the admitted symptoms, painful, burning and frequent urination, pain in lower abdomen, back, hips, crotch, arms, legs, and the like; and that since their operations they had not felt such pains, but had done their normal work (R. 395, 415, 417), but the Court excluded all such evidence; these errors urged in assignments 1-16, br.. for appellant, R. 1225, Props. 1-7, pp. 40-43.

5. ERRONEOUS CHARGES: The Court charged (R. 1091-1113) that "if the article be one which is privileged, there is no liability, whether it is true or not . . .

question of malice or lack of malice does not enter into it . . . if reasonable and fair comment or c r i t i s m with regard to matters of public concern,—verdict should be for the defendant, even though you find such matters of comment and critism to be false . . . occasion is privileged one . . . and if comment or critism fair and reasonable, though may exceed the limits of what he can legally prove to be the truth, he is protected from liability . . . matters of public h e a l t h are of public concern". There were many like repetitions in the charge; all excepted to, but all exceptions overruled (R. 1113, 1120).

SPECIFICATIONS OF ERROR

First Specification

The Circuit Court of Appeals erred, in its construction of arts. 5431 and 5432 of the Revised Civil Statutes of the State of Texas of 1925, as amended in 1927 by the Act of the 40th Legislature, regular session, Ch. 80, p. 121, in holding that the publication complained of, wherein it charged petitioner, a physician, a private citizen, with arch quackery, corruption, fraud and the crime of using the United States mails to defraud, was privileged as reasonable and fair comment or criticism or honest opinion. (Based on Specifications Nos. 15, 16, pp. 11-17, 5 and 6, pp. 4-5, in Petition for Rehearing in Circuit Court of Appeals; Nos. 27, 28, pp. 30-36, Br. for Appellant in that Court.)

Second Specification

The Circuit Court of Appeals erred in holding that, under the Texas Libel Statute, the acts of a private practitioner of medicine, not a candidate nor public office holder, in relation to his practice, are matter of public concern. (Based on Specifications Nos. 17, pp. 18-20, 8, p. 6, in Petition for Rehearing in Circuit Court of Appeals; No. 29, p. 36, br. for Appellant in that Court.)

Third Specification

The Circuit Court of Appeals erred in holding that because of the admissions of petitioner, in effect that he first obtained medical degree from an institution later termed a diploma mill, and had been practicing since 1915,

began practice in Milford, Kansas in 1917, there advertised by pamphlet and newspapers and radio an operation for transplanting goat glands for sexual rejuvenation, and had treated 5,000 to 6,000 persons, charging some as high as $750.00 therefor, and had a gross income of about $100,000.00 a month, abandoned the goat gland practice in 1933; that his radio license and his license to practice medicine in Kansas and in Connecticut was revoked about 1930, and he was indicted in California for conspiracy to unlawfully practice medicine, and that at the time of the writing of the article in question he was advertising, by radio from Mexico, and was prescribing by letter to persons who wrote their symptoms, and charged therefor, the charge of quackery at the time of the publication in question, which was the gist of the publication, was thereby made out, and that the jury verdict and judgment thereon should therefore be affirmed without regard to errors of the trial court in admission and rejection of evidence and in charge, and without reviewing the assignments; notwithstanding substantial testimony in the record for petitioner that he had been practicing medicine since 1915, and had had extensive study, research and experience to qualify himself, and that for five years preceding the publication in question he had abandoned and not practiced the goat gland transplantation operation, which had been begun and continued experimentally, though that had been efficacious in many cases, and that for five years preceding the publication complained of he had maintained his hospital and practice for the specialty of prostate operation, for which he had qualified himself, having worked out a milder technique for the relief of extensive suffering in men due to prostate enlargement and disease, and that such technique was successful in about

90% of the cases, and that he gave faithful and beneficial treatment to all patients in his hospital and was not defrauding them, nor certainly during said five years last past practicing quackery nor fraud, but giving benefit and value to his patients, and was not using the United States mails to defraud,—the evidence for petitioner thus raising jury issue which the Circuit Court of Appeals had no right in law to thus decide. (Based on Specifications Nos. 1, 2, 3, 5, 6, 7, pp. 1-6, Nos. 9, 9-a, 10, 11, 12, pp. 6-10, in Petition for Rehearing in Circuit Court of Appeals; Nos. 1-17, pp. 12, 26, Nos. 24, 28, br. for Appellant in that Court.)

Fourth Specification

The Circuit Court of Appeals erred in holding that the gist of the publication complained of as libelous was the charge of quackery, notwithstanding same specifically accused petitioner of swindling and cheating his clients, and fraud on the public and with the crime of using the United States mails to defraud. (Based on Specifications Nos. 1-6, pp. 1-5, in Petition for Rehearing in Court of Circuit Appeals.)

Fifth Specification

The Circuit Court of Appeals erred in holding that petitioner's departure from accepted professional ethics is sufficient to support a reasonable and honest opinion that he should be considered a charlatan and a quack, and that the article in question was therefore privileged. (Based on Specification No. 6, p. 4, Petition for Rehearing.)

Sixth Specification

The Circuit Court of Appeals erred in holding, in effect, that the record discloses no substantial evidence to show respondent was actuated by malice in the publication in question. (Based on Specification No. 4, p. 3, Petition for Rehearing.)

Seventh Specification

The Circuit Court of Appeals erred in holding, in effect, that the record discloses no substantial evidence to show that petitioner suffered "actual damage compensatable in money". (Based on Specification No. 9, pp. 6-7, Petition for Rehearing.)

Eighth Specification

The Circuit Court of Appeals erred in holding it was not required to pass on petitioner's specifications of error, refusing to do so, on account of admissions by petitioner that, contrary to the rule of ethics in the medical profession, he was an advertising doctor, and had years previously advertised and practiced goat gland transplantation, receiving large pay therefor, and had been denied renewal of radio license, and his license to practice medicine in two states had been revoked, and he had been indicted for conspiracy to unlawfully practice in one state; all notwithstanding the evidence for petitioner showed he was practicing, and had for five years practiced, as a specialty, a beneficial technique efficacious to relieve men suffering from prostatic disease, milder and less harmful than the customary operation therefor, worked out after long research and experience; and that his practice was, otherwise

than his advertising, regular, and not a fraud on his patients nor the public, nor in violation of the United States mail fraud statute, thus raising jury issue by substantial evidence which the said Court had no right to override. (Based on Specifications Nos. 1-18, pp. 1-20, Petition for Rehearing in Court of Circuit Appeals.)

REMARKS

That the case was one for jury issue, and which the Appellate Court had no right to decide against petitioner on the facts, appears most clear. Perhaps no more forceful illustration can be made than that wherein the court said it found no evidence of malice, in the face of the most vituperative article itself, the fact respondent had, ten years before, been sued by petitioner, that on shipboard and elsewhere respondent had even refused to speak to petitioner or his wife, and had his own daughter desist from playing with their son, forthwith wrote and published two articles denouncing petitioner, and pleaded the truth of his denunciatory accusations. We think no authority denies that such state of facts raises the issue of malice, even the article itself would do so. Against the finding of no monetary damage in the face of so extreme a publication against a professional man who had so large and widely scattered a patronage, it is shown the publication was read throughout America, shown too, that it caused petitioner much mortification, shame and humiliation, as was natural, and that his gross income fell off following the publication by about $200,000.00 in the year, as was calculated from such a publication. Such conclusions on part of the Circuit Court of Appeals are quite unjustifiable in the evidence.

The rule that Circuit Court of Appeals may not decide controverted fact issue, but that if, considering the evidence most favorably to an appellant, and excluding all contrary evidence, the jury might have found for the appellant if excluded competent evidence for him had been admitted, or if admitted incompetent evidence had been excluded, or if error in charge had not been committed,

it is the duty of the court to reverse, is not materially different in our federal courts from the Texas rule. Where reasonable minds may honestly differ, jury question exists.

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Engstrom vs. DeWitt (8th C.) 58 Fed. (2) 137, 138.
Cf.
GH&SA vs. American Gro. Co. 122 Tex. 1, 36 S. W. (2) 985, 990;
Williamson vs. Tex. Indemnity Ins. Co. 127 Tex. 71, 90 S. W. (2) 1088, 1089;
Burrage vs. Red Arrow Taxi Co., 123 S. W. (2) 731, 732, syl. 1-4, and authorities collated;
Caller Times Pub. Co. vs. Chandler, 122 S. W. (2) 249, 253, affd. 130 S. W. (2) 853.

In the last cited case (a libel case) the court said:

> "There was material evidence, whether false, fanciful, incongruous or silly, as some of it appears to be, to support the statements, and it was for the jury, and not the court, to appraise that evidence and resolve the issues raised by it."

Concerning the contention that the Court erroneously erred in his charge on "reasonable and fair comment", and "public concern", and that the decision of the Fifth Court is wrong, the settled rule, in both respects, is to the contrary, as will be plainly manifested from the authorities cited pages 11 and 12 the petition, supra. So familiar, we think, is this Court with those rules we shall not here consume space to quote from the decisions, but merely remark that as to reasonable and fair comment, the Federal and Texas decisions are in accord, and accord with the general rule, while the question of "public concern" has not, we think, been decided by this Court, al-

though the Texas cases are, we think, clear, while the South Dakota case of Rood vs. Dutcher, 120 N. W. 772 is definite, on the point.

Then, an examination of our Texas statutes on the subject, in the light of the rule of *ejusdem generis* announced in our Texas Supreme Court's decision in the case of Farmers & Mechanics Nat'l Bank vs. Hanks, 104 Tex. 320, 137 S. W. 1120, will, we think, render very clear that our Texas statute does not embrace the acts of a private practitioner as of "public concern."

Certainly it must be said that the evidence raised plain fact issues which can only be rightly resolved by the jury on correct rulings in the admission and exclusion of evidence, and in charge; and that the Circuit Court of Appeals, in its apparent consideration only of the advertising doctor's departure from the ethical rule, has not only invaded the rightful jury province, but has done violence to all the many noble expressions of our courts of last resort in respect to the right of trial by jury.

It is therefore respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers by granting the writ of certiorari and thereafter reviewing and reversing said decision.

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